Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1291

ROEL ANGEL TREVINO,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

ROEL ANGEL TREVINO,
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versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Roel Angel Trevino petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on January 10, 1978, Petition for Rehearing denied February 6, 1978.

REFERENCE TO OPINION BELOW

The opinion and order of the United States Court of Appeals for the Fifth Circuit are not yet reported; a copy of the judgment is appended hereto in Appendix A, infra, pp. 1a-2a and a copy of the opinion and order

denying petition for rehearing are appended hereto in Appendices B and C, infra, pp. 2a-9a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on the 10th day of January, 1978. Appellant timely filed his Petition for Rehearing which was denied February 6, 1978. Appellant's counsel first became aware of the denial of the Petition for Rehearing on February 16, 1978, when counsel received notice by United States mail that mandate had issued on the judgment. Counsel immediately communicated by telephone with the Office of the Clerk, United States Court of Appeals for the Fifth Circuit and was advised that a copy of the Court's order had been mailed to counsel, properly addressed, on February 6, 1978. Such order, properly addressed, was received by the undersigned counsel on February 27, 1978. It is respectfully submitted that this Petition for Certiorari is timely under Supreme Court Rule 22(2), 28 U.S.C.A. and the decision of this Court in *Durham v. United States*, 401 U.S. 478, 91 S.Ct. 858 (1971).

Jurisdiction to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit by Writ of Certiorari is invoked pursuant to 28 U.S.C., §1254(1).

QUESTION PRESENTED

Whether the Trial Court's comment on Appellant's right against self-incrimination affected a substantial right of Appellant guaranteed him under the Fifth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; not shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Rule 52(b), Federal Rules of Criminal Procedure, 18 U.S.C., provides:

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

STATEMENT OF THE CASE

Roel Angel Trevino was convicted by a jury upon an indictment charging him with conspiracy to possess with intent to distribute a quantity of marijuana in violation of Title 21, U.S.C., §846 and his punishment assessed at five (5) years imprisonment. (R. 470)

The comments complained of were made at the very beginning of the trial when the prosecuting attorney elicited from its first witness, Raul Garza, a co-indictee who had been granted immunity, that (1) he had been previously convicted in Baltimore, Maryland on marijuana charges, (2) that his case was tried before a jury on a plea of not guilty, and (3) he did not testify in that trial. (R. pp. 16-18) Appellant's counsel objected to this line of questioning and requested that the Court "instruct the jury not to consider that question for any purpose in regard to this case," and further moved for a mistrial. (R. p. 18)

Denying Appellant's Motion for Mistrial, the Court advised the jury as follows:

> "Ladies and gentlemen, you understand, of course, that as far as the law is concerned, the Defendant in any case no matter where it is in the United States does not have to testify. He cannot be required in any way to incriminate himself and the fact that he does take that position is no evidence of any kind at all and you are not to consider it in any circumstances insofar as this Defendant or any other Defendant . . . ." (R. pp. 18-19)

In affirming Appellant's conviction, the United States Court of Appeals for the Fifth Circuit found that such instruction does not constitute plain error. However, the Court concluded its opinion with the following admonishment:

> "In order to prevent this problem from occurring, the District Court should not, in its

> explanation of the right to remain silent, mention that a defendant can assert his Fifth Amendment privilege in order to avoid self-incrimination. The Court can thus eliminate only possible inference that the testimony of a particular defendant would be incriminating."

REASONS RELIED UPON FOR ALLOWANCE OF A WRIT

1.

The constitutional question presented arises under the Fifth Amendment. Appellant contends that the comments made by the Trial Court affect a substantial right guaranteed him under the Fifth Amendment and as such constitutes plain error under Rule 52(b), Federal Rules of Criminal Procedure. The only inference that the jury could have drawn from the Trial Court's comment is that Appellant has a right to avoid self-incrimination by not testifying, and if he did take that position, his testimony would be incriminating. Appellant asserts that this was the inference drawn by the Circuit Court resulting in the admonishment as hereinabove set forth.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 1619 (1966) Mr. Chief Justice Warren speaking for this Court traced the sources from which the right against self-incrimination came and concluded that:

> "The privilege (against self-incrimination) has come rightfully to be recognized in part as an individual's *substantive right* . . ." (Emphasis Added)

In *Griffin v. United States*, 380 U.S. 609, 85 S.Ct. 1229, (1965) Mr. Justice Douglas, speaking for this Court, in holding that a trial judge's comment on defendant's failure to testify is reversible error, compared such comments on refusal to testify with the "inquisitorial system of criminal justice which the Fifth Amendment outlaws."

Appellant contends that the comments of the trial judge deprived him of a substantial right guaranteed him under the Fifth Amendment and that this cause should have been reversed and remanded.

2.

The instant case is an appropriate vehicle for settling important questions of Federal Law under Rule 52(b), Federal Rules of Criminal Procedure. The question submitted requires a determination of what constitutes a substantial right to be noticed by Circuit Courts as plain error.

CONCLUSION

For the reasons set forth above, this Petition for a Writ of Certiorari should be granted and upon hearing of this cause on its merits the opinion and judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and remanded for further proceedings.

Respectfully submitted,

_____

Kenneth L. Yarbrough

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ATTORNEYS FOR
PETITIONER

CERTIFICATE OF SERVICE

I, Kenneth L. Yarbrough, do certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served on counsel for Respondent by depositing same in the United States Mail, postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530, and to the Honorable Tony Canales, United States Attorney, P. O. Box 61129, Houston, Texas 77208, this ____ day of March, 1978.

_____

Kenneth L. Yarbrough

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5287
Summary Calendar

D. C. Docket No. CR-76-C-182

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROEL ANGEL TREVINO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before THORNBERRY, RONEY and HILL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 10, 1978

ISSUED AS MANDATE: FEB. 14, 1978

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

versus

Roel Angel TREVINO,
Defendant-Appellant.

No. 77-5287
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Jan. 10, 1978.

Appeal from the United States District Court for the Southern District of Texas.

Before THORNBERRY, RONEY and HILL, Circuit Judges.

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* Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

PER CURIAM:

Appellant Trevino was charged with conspiring to possess marijuana with intent to distribute in violation of 21 U.S.C. § 846. Five other persons were indicted as coconspirators,[1] and one of them, Garza, was the key government witness at Trevino's trial. In exchange for his testimony, Garza was dismissed as a defendant in this and another case, and, apparently as part of the bargain, he pled guilty in a third case.

Trevino was convicted by a jury and sentenced to five years imprisonment, with a special parole term of five years. He raises two issues on appeal: (1) admissibility of evidence of extraneous offenses, and (2) alleged prejudice stemming from the trial court's instruction to the jury on Trevino's right to remain silent. We affirm.

Garza's testimony was critical in obtaining Trevino's conviction. Although D.E.A. agents had kept the other coconspirators under surveillance and had caught them red-handed, they had observed Trevino only in an incidental manner, when four of the coconspirators stopped at an automotive shop owned by Trevino. Garza testified that he had spoken by telephone with Trevino and coconspirator Alvarez about the marijuana shipment that was subsequently foiled by the D.E.A. agents, that Trevino and Alvarez were in the deal together, and that Trevino had sent a trailer to Garza to be loaded with marijuana.

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1 One coconspirator was transferred to Florida pursuant to Rule 20, Fed.R.Crim.P., two pled guilty to superseding informations, and another pled guilty to the conspiracy charge.

The defense theory clearly was that Trevino was not involved in the marijuana transaction and that he had spoken with Garza only about the purchase of an irrigation pump.[2] Garza admitted on cross-examination that he had discussed the pump in phone conversations with Trevino. The government then sought to introduce evidence of Trevino's participation with Garza and Alvarez in previous marijuana transactions. The trial court admitted the evidence, which consisted solely of testimony from Garza. According to Garza, Trevino had induced him to sell marijuana to Alvarez. Garza said he supplied the marijuana to Trevino, who then resold it to Alvarez at a higher price. Alvarez apparently wanted to deal directly with Garza, but Garza claimed to have rejected such an arrangement.

Trevino complains that admission of this evidence is contrary to Rule 404(b), Fed.R.Evid., and decisions of this court regarding extraneous offenses.[3] He first argues that the trial court failed to examine the evidence to determine if it was "clear and convincing" before allowing it to go to the jury. In *United States v. Broadway*, 477 F.2d 991 (5th Cir. 1973), we stated that the trial court should conduct such an in-

2 In addition to questioning Garza about the pump, defense counsel attempted to establish that Garza had told him in an interview that Trevino had nothing to do with the marijuana deal and that Alvarez had bypassed Trevino to deal directly with Garza. The trial court refused to admit this testimony, which was taken out of the jury's presence. Trevino does not challenge this ruling on appeal.

3 We do not reiterate here the familiar rules governing admission of such evidence. These standards are set out in such cases as *United States v. Myers*, 550 F.2d 1036 (5 Cir. 1977); *United States v. Brunson*, 549 F.2d 348 (5 Cir. 1977); and *United States v. Bloom*, 538 F.2d 704 (5 Cir. 1976).

dependent examination. His failure to do so is not reversible error, however, for this court will make such a determination on appeal.

We conclude that the standard is met here. The fact that Garza was an accomplice with a grant of immunity whose testimony was uncorroborated is not dispositive. Because such testimony is sufficient to support a conviction, *e.g.*, *United States v. Stanley*, 433 F.2d 637 (5th Cir. 1970); *Tillery v. United States*, 411 F.2d 644 (5th Cir. 1969), it is sufficient for purposes of the "clear and convincing" rule. *See United States v. Brunson*, 549 F.2d 348 (5th Cir. 1977) (some corroborating details present); *United States v. Crockett*, 534 F.2d 589 (5th Cir. 1976) (alternative holding). Moreover, the trial court gave an appropriate cautionary instruction regarding uncorroborated accomplice testimony. *See Tillery v. United States*, *supra*.

Trevino also argues that there was no substantial need for the probative value of the evidence provided by the prior offense. This argument is plainly without merit. First, the existence of a plan was a material issue at the trial, and Garza's testimony regarding the prior offense helped establish the total picture. Second, and more significantly, the prior offense evidence was crucial in establishing Trevino's intent. The government had a substantial need for the evidence in order to contradict the defense theory that the telephone calls were innocuous in nature and dealt only with the purchase of a pump. *See United States v. Brunson*, *supra*, 549 F.2d at 361 (prior offense necessary to contradict defendant's claim that he was ignorant of the crime charged).

Finally, Trevino contends that the extraneous offense and the charged offense were not sufficiently similar, pointing out that he was allegedly a "middleman" in the former scheme but did not perform that function in the deal that led to the present case. We find this distinction meaningless, for both acts constitute the same basic offense, *i.e.*, a drug conspiracy. Where, as here, the play has remained the same but the actors have exchanged roles, there is no need to drop the curtain of inadmissibility.[4] We thus conclude that the trial court did not abuse his broad discretion in admitting this evidence.

Trevino also argues that the trial court, via an instruction to the jury, impermissibly commented on his failure to testify in his own behalf. In questioning Garza, the first witness, the government's attorney established that Garza had been previously convicted on marijuana charges in Maryland and that he had not taken the stand at his trial. Defense counsel objected to the questions and answers on the ground that they were comments on whether Trevino would testify later in the proceedings. Counsel then asked the court to instruct the jury not to consider the exchange for any purpose and moved for a mistrial. The court denied the motion but gave this instruction:

> [A]s far as the law is concerned, the defendant in any case no matter where it is in the United States does not have to testify. He cannot be required in any way to incriminate himself and the fact that he does take that position is no evidence of any kind at all and you are not to consider it in any circumstance. . . .

4 We also note that when intent is at issue, the offenses need not be identical to pass the similarity test. *E.g.*, *United States v. Shadletsky*, 491 F.2d 677 (5 Cir.), *cert. denied*, 419 U.S. 830, 95 S.Ct. 52, 42 L.Ed.2d 55 (1974); *United States v. Crockett*, 514 F.2d 64 (5 Cir. 1975).

First, we note that the questions asked by the government's attorney were not improper comments on Trevino's subsequent assertion of his fifth amendment privilege. *See United States v. Deaton*, 468 F.2d 541 (5th Cir. 1972), *cert. denied*, 410 U.S. 934, 93 S.Ct. 1386, 35 L.Ed.2d 597 (1973). The inquiries were not of such character that the jury would naturally and necessarily take them as comments on the defendant's silence. *United States v. Dearden*, 546 F.2d 622 (5 Cir. 1977); *United States v. White*, 444 F.2d 1274 (5 Cir.), *cert. denied*, 404 U.S. 949, 92 S.Ct. 300, 30 L.Ed.2d 266 (1971).

Trevino contends, however, that the instruction itself constituted an improper comment. Although we have in the past held that an unsolicited comment by a trial judge can be prejudicial, *Davis v. United States*, 357 F.2d 438 (5 Cir. 1966), we find no prejudice here, in a situation far different from that in *Davis*. First, defense counsel invited the comment by requesting a cautionary instruction. Second, counsel did not make a specific request as to the form or content of the instruction, and after it was given he lodged no objection and sought no further clarification. In these circumstances, we cannot say that the instruction constitutes plain error, the standard applicable in light of counsel's request for the instruction and his failure to object. *See United States v. Pena*, 527 F.2d 1356 (5 Cir. 1975), *cert. denied*, 426 U.S. 949, 96 S.Ct. 3168, 49 L.Ed.2d 1185 (1976); *United States v. Velasquez*, 496 F.2d 1009 (5 Cir. 1974). In order to prevent this problem from oc-

curring, the district court should not, in its explanation of the right to remain silent, mention that a defendant can assert his fifth amendment privilege in order to avoid self-incrimination. The court can thus eliminate any possible inference that the testimony of a particular defendant would be incriminating.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5287

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROEL ANGEL TREVINO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(February 6, 1978)

Before THORNBERRY, RONEY and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ HOMER THORNBERRY
United States Circuit Judge

[Filed: FEB. 6, 1978]